

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
CELLULAR SOUTH LICENSE, INC.)	
)	CC Docket No. 96-45
Petition for Designation as an)	
Eligible Telecommunications Carrier)	
in the State of Alabama)	
To:		The Commission

REPLY TO RESPONSE TO MOTION TO DISMISS

Cellular South License, Inc. ("Cellular South"), by its attorneys and pursuant to § 1.45(c) of the Commission's Rules ("Rules"), hereby replies to the Response to Motion to Dismiss ("Response") filed by the Alabama Rural Local Exchange Carriers ("ARLECs") in the above-captioned proceeding.

We cannot disagree with the ARLECs' interpretation of the public notice by which the Wireline Competition Bureau ("Bureau") invited parties to "update" the record in proceedings involving the designation of eligible telecommunications carriers ("ETCs"). *See Parties are Invited to Update the Record Pertaining to Pending Petitions for ETC Designations*, DA 04-999, at 1 (Wireline Comp. Bur. Apr. 12, 2004) ("*Update PN*"). The notice was confusing insofar as it was wholly inconsistent with the Rules, both as to its issuance and its substance.

The Bureau purported to act pursuant to §§ 1.415 and 1.419 of the Rules. *See Update PN*, at 2. However, §§ 1.415 and 1.419 apply only in "notice and comment rulemaking proceedings conducted under 5 U.S.C. 553." 47 C.F.R. § 1.399. The process of designating an ETC under § 214(e)(6) of the Communications Act of 1934, as amended ("Act") is not a rulemaking under § 553 of the Administrative Procedure Act ("APA").

Section 254(a) of the Act provides that “only an [ETC] designated under section 214(e) shall be eligible to receive specific Federal universal service support.” 47 U.S.C. § 254(a). Designation as an ETC is a “license” under the APA, because it serves as the Commission’s “permit, certificate, approval . . . or other form of permission” to receive federal universal support. 5 U.S.C. § 551(8). The process by which the Commission grants a “license” to receive universal service support constitutes “licensing” under the APA. *Id.* § 551(9). Thus, a proceeding to designate an ETC is a “process for the formulation of an order,” *id.* § 551(7), “in a matter other than rule making but including licensing.” *Id.* § 551(6). Therefore, the ETC designation process is an “adjudication” under the APA. *See id.* § 551(7).

The process by which the Bureau granted Cellular South’s petition for designation, *see Cellular South License, Inc.*, 17 FCC Rcd 24393, 24408 (Wireline Comp. Bur. 2002), was an informal adjudication under § 555 of the APA. *See* 5 U.S.C. § 555(b), (e). For that reason, the notice and comment rulemaking procedures of Subpart C of Part 1 of the Rules, including §§ 1.415 and 1.419, did not apply in this case. *See* 47 C.F.R. § 1.399.

Regardless of the nature of the proceeding before the Bureau, the ARLECs filed their application for Commission review explicitly under the provisions of § 1.115 of the Rules. *See* Application for Review of the ARLECs, CC Docket No. 96-45, at 1 (Dec. 30, 2002). Accordingly, the filing triggered the procedural requirements of § 1.115 generally, and the pleading deadlines of § 1.115(d) specifically.

The Commission must abide by its own rules, *see, e.g., Reuters Limited v. FCC*, 781 F.2d 946, 947 (D. C. Cir. 1986), including rules of procedure. *See Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976). Thus, absent a rule waiver, the Commission was bound by the requirement of §

1.115(d) that an application for review of the Bureau's order in this case, and any supplement thereto, "shall be filed within 30 days of public notice of such action." 47 C.F.R. § 1.115(d). Also bound by the Rules, and without authority to act on applications for review of its own actions, *see id.* § 0.291(d), the Bureau could not invite the ARLECs to supplement their pending application for review after the 30-day deadline set by § 1.115(d). Nor could it establish a pleading cycle under §§ 1.415 and 1.419, when subsections (d) and (f) of § 1.115(d) governed the pleadings in this case.

The Bureau's failure to adhere to the Rules is prejudicial to Cellular South. By its departure from the Rules, the Bureau may have effectively: reopened the proceeding to permit non-parties to participate, *but see* 47 C.F.R. § 1.115(a); allowed parties to raise questions of law or fact upon which it had been afforded no opportunity to pass, *but see id.* § 1.115(c); invited the filing of unauthorized and untimely pleadings, *but see id.* § 1.115(d); and opened a restricted proceeding to ex parte presentations. *But see id.* § 1.1208.

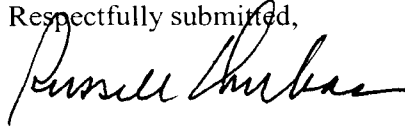
From a procedural standpoint, this case is floundering. We are uncertain as to what must be done to get the proceeding back on course. The ARLECs suggest that the supplement to their application for review is properly on file, but that the supplemental information Cellular South filed is not. *See* Response, at 1. That Cellular South was confused by the *Update PN* does not make the ARLECs' supplement timely-filed or excuse their failure to belatedly request a waiver of § 1.115(d) or seek leave to file their pleading. In contrast, Cellular South may not have followed the Bureau's departure from § 1.115, but it violated no rule.

The ARLECs erred when they claim that Cellular South has until May 28, 2004 to "comment" on the supplement to their application for review. *See id.* In fact, Cellular South has the right under § 1.115(d) to file an opposition to the supplemented application for review. *See* 47

C.F.R. § 1.115(d). The 15-day filing period for the opposition will expire on June 1, 2004. *See id.*

§§ 1.4(j), 1.115(d).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Russell Lukas", written over the typed name.

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May 28, 2004

CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 28th day of May, 2004, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing *Reply to Response to Motion to Dismiss* filed today to the following:

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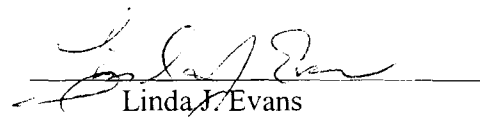
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